

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

THE D&M CAPITAL GROUP LLC,

Debtor.

Lead Case No. 19-11711-scc
New York, New York
December 12, 2019
10:21 a.m. - 12:37 p.m.

- AGENDA -

AP: 19-01300-SCC, THE D&M CAPITAL GROUP, LLC VS.

ESSEX GLOBAL TRADING, LLC ET AL

EMERGENCY APPLICATION FOR EX PARTE RELIEF ORDER TO SHOW CAUSE

WHY AN ORDER SHOULD NOT BE ENTERED GRANTING A TEMPORARY

RESTRAINING ORDER AND RELATED RELIEF FILED BY AURORA CASSIRER

ON BEHALF OF THE D&M CAPITAL GROUP, LLC (DOC #32)

BEFORE THE HONORABLE SHELLEY C. CHAPMAN

UNITED STATES BANKRUPTCY JUDGE

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8 *(Proceedings recorded by electronic sound recording)*
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In re D&M Capital Group LLC - 12/12/19

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[REDACTED]

Okay. Before the Court is the application of D&M Capital Group, hereinafter the plaintiff or the debtor, seeking a preliminary injunction, one, enjoining and restraining (a) the defendants in this adversary proceeding and (b) all persons

In re D&M Capital Group LLC - 12/12/19

53

1 known and unknown including without limitation Mourad Equities
2 and Anna Joukova from transferring, selling, encumbering, or
3 otherwise disposing of the precious stones, as defined
4 hereinafter; and, two, directing the defendants to immediately
5 bring back four of the precious stones and place them in transit
6 from their current locations to the United States and, upon
7 their return, deposit such stones in the vault at Chase Bank
8 where Item Numbers JE0104 and JP105, two of the precious stones,
9 are currently being kept.

10 The term "precious stones" refers to the following six
11 items of jewelry: one, Item 2950, also referred to during this
12 proceeding as JR0261, a pink diamond ring; number two, Item
13 JE0104, a pair of emerald pearl and diamond earrings; three,
14 Item JP105, a cross pendant; four, Item JR0280, a yellow diamond
15 ring; five, Item JR036, a ruby ring; and item seven -- and item
16 six, Item JR0182, the Kashmir sapphire ring.

17 The debtor asserts that the six precious stones are
18 property of the estate and argues that the Court should issue a
19 preliminary injunction in order to protect the estate from
20 immediate and irreparable harm which would occur from the
21 transfer or disposition of the previous stones during the time
22 that it takes to litigate the adversary proceeding to final
23 judgment.

24 In sharp contrast, Alex Paul and Essex Global Trading,
25 LLC, the defendants in this adversary proceeding, claim that the

1 precious stones were and are the property of Essex, that the
2 debtor cannot show a likelihood of success on the merits of the
3 amended complaint, and that the requested injunction is
4 unwarranted and should be denied.

5 An evidentiary hearing on the debtor's application for
6 a preliminary injunction was held before this Court on December
7 9th, 10th, and today, December 12th, 2019. In support of its
8 application, the debtor called the following witnesses, Mr. Moty
9 Spector and Ms. Rafaella Calandria. In support of its objection
10 to the debtor's application, Essex called the following
11 witnesses: Mr. Justin Sakmeki (phonetic), Mr. Aleks Paul, and
12 Mr. Lawrence Paul.

13 The legal standard. Within the Second Circuit, courts
14 have applied "the traditional preliminary injunction standard as
15 modified to fit the bankruptcy context in determining whether
16 injunctive relief is warranted. Nevada Power Company v. Calpine
17 Corporation, In re Calpine Corporation, 365 B.R. 401-409 (Bankr.
18 S.D.N.Y. 2007). See also, In re Shatter Gay Corporation, 2001
19 B.R. 48 at 71 (Bankr. S.D.N.Y. 1996). Both decisions, I would
20 note, rendered by the late Judge Lifland.

21 The traditional standards for seeking a preliminary
22 injunction are that the party seeking the injunction must show,
23 one, a likelihood of irreparable harm in the absence of the
24 injunction and, two, either a likelihood of success on the
25 merits or sufficiently serious questions going to the merits

In re D&M Capital Group LLC - 12/12/19

55

1 where the balance of hardships tipping decidedly in the
2 movant's favor. *Doninger v. Niehoff*, 527 F.3d 41 at 47 (2d
3 Cir. 2008).

4 Bankruptcy courts have incorporated the following more
5 bankruptcy-specific factors in determining whether there is
6 irreparable harm and which party is likely to prevail on the
7 merits, "Whether there is a likelihood of a successful
8 reorganization; two, whether there is an imminent irreparable
9 harm to the estate in the absence of an injunction; three,
10 whether the balance of harm tips in favor of the moving party;
11 and four, whether the public interest weighs in favor of an
12 injunction." *In re Calpine Corporation*, 366 B.R. 409 (Bankr.
13 S.D.N.Y. 2007).

14 Courts considering these factors have taken a flexible
15 approach with no single factor being determinative here. The
16 Court finds that for the current purposes whether or not the
17 bankruptcy-specific standard or the more general second standard
18 applies would not make a difference in the outcome of its
19 determination.

20 Discussion. Whether the precious stones are
21 property of the estate is a threshold issue in this matter.
22 Essex argues that the debtor cannot demonstrate that the
23 precious stones are property of the estate because the evidence
24 and the law both support a finding that the precious stones
25 belong to Essex. The Court disagrees. At this preliminary

In re D&M Capital Group LLC - 12/12/19

56

1 injunction hearing, the debtor adduced documentary evidence
2 together with the testimony of the debtor's principal, Moty
3 Spector, as to five of the six precious stones sufficient to
4 create a presumption that these five precious stones are
5 property of the debtor's estate.

6 Such evidence was sufficient to support a prima facie
7 showing that the debtor either has a full or partial ownership
8 interest in each of five of such stones. These five stones are
9 as follows: one, Item 2950, a pink diamond ring; two, Item
10 JE0104, a pair of emerald pearl and diamond earrings; three,
11 Item JP105, a cross pendant; four, Item JR0280, a yellow diamond
12 ring; and five, Item JR0182, the Kashmir sapphire ring.

13 As such, the burden shifts to Essex to demonstrate
14 that such stones are not property of the debtor's estate. The
15 documentary and testimonial evidence adduced by Essex failed to
16 refute the debtor's prima facie showing as to these five
17 precious stones. Regarding the sixth precious stone, Item
18 JR0306, a ruby ring, Mr. Spector confirmed in his testimony on
19 cross-examination that D&M sold 100 percent ownership in this
20 ring to SB Diamond Corporation. According to the invoice
21 presented as Exhibit 44, it appears that D&M currently has an
22 interest in 50 percent of the profits from any future sale of
23 the ruby ring. An interest in future profits from the future
24 sale of the ruby ring is not the same as an ownership interest.

25 Notwithstanding, the Court finds that D&M has

In re D&M Capital Group LLC - 12/12/19

57

1 demonstrated sufficient evidence to claim a possessory interest
2 in the ruby ring as a consignee of SP Diamond Corporation. D&M
3 (sic) consigned the ruby stone to D&M on December 4th, 2018 as
4 set forth in Exhibit 1 and such stone eventually was turned into
5 the ruby ring. Accordingly, D&M has met its burden to establish
6 an interest in the ruby ring and Essex has not introduced
7 sufficient evidence to controvert this documentary evidence.

8 Likelihood of success on the merits. Essex argues
9 that even if the debtor is able to establish that ownership of
10 the precious stones is in question such that the debtor has met
11 its burden of proof, the debtor cannot prove a likelihood of
12 success on the merits with respect to the causes of action
13 asserted in the amended complaint. Accordingly, Essex maintains
14 the preliminary injunction should be denied.

15 Essex asserts that it has an enforceable and perfected
16 security interest in each of the precious stones which gives
17 Essex a, quote/unquote, superior interest in the stones that
18 will require denial of the debtor's ultimate claims for turnover
19 under Section 542 of the Bankruptcy Code. With respect to
20 Essex's claims regarding its alleged security interest, the
21 debtor maintains that it never signed a security agreement
22 granting Essex a security interest in any of the previous stones
23 and that the consignment memos in evidence negate any alleged
24 intent to create a security interest in the precious stones.

25 Article 9 of the New York Uniform Commercial Code

In re D&M Capital Group LLC - 12/12/19

58

1 governs the validity of security interests in personal property.
2 Pursuant to Section 9-203, an enforceable security interest
3 cannot exist absent a security agreement, New York UCC Law
4 Section 9-203(b)(3). See also, In re Adirondack Timber
5 Enterprises, Inc. No. 08-12553, 2010 WL 1741378*3 (Bankr.
6 N.D.N.Y. April 28, 2010), "Unless the grant of a security
7 interest is contained in the security agreement, there is no
8 security interest." Citations omitted.

9 Security agreement is defined in relevant part as "an
10 agreement that creates or provides for a security interest."
11 New York UCC Section 9-102(a)(74). Generally, a security
12 agreement must describe the collateral and be signed by the
13 debtor. Id. Section 9-203(b)(3)(A). See also, In re
14 Lanzatella, 254 B.R. 84 (Bankr. W.D.N.Y. 2000).

15 A security interest may arise without a signed writing
16 under certain limited circumstances. Specifically, if the
17 putative secured party obtains possession of the collateral
18 pursuant to an oral or unauthenticated security agreement, then
19 an enforceable security interest may arise without a signed
20 writing. See New York UCC Law Section 9-203(b)(3)(B).

21 Like a common law pledge, Section 9-203(b)(3)(B) and
22 Section 9-313(a) of the UCC require intentional physical
23 delivery of the collateral by the debtor to the putative secured
24 creditor, and that party must have actual and exclusive
25 possession of the collateral for its interest to be deemed

1 enforceable and perfected.

2 Here, no written authenticated security agreement
3 between the parties that describe the collateral and was signed
4 by the debtor was admitted into evidence during the evidentiary
5 hearing. Accordingly, Essex does not have a security interest
6 in the precious stones pursuant to Section 9-203(b)(3)(A) of the
7 Uniform Commercial Code.

8 Through the testimony of Mr. Alex Paul, Essex claims
9 that the parties had an oral security agreement and
10 understanding that the debtor would pledge the precious stones
11 to Essex as collateral for a loan and Essex would take
12 possession of the purported collateral as a secured creditor.
13 While Essex is able to demonstrate that it did have possession
14 of the precious stones from time to time, for Essex to succeed
15 with respect to its claim that a security interest arose without
16 a signed writing, it would need to demonstrate that the debtor
17 intended to create a pledge of collateral.

18 Sections 9-203(b)(3)(B) and Section 9-313(a) of the
19 Uniform Commercial Code require intentional physical delivery of
20 the collateral by the debtor to the putative secured creditor as
21 well as actual and exclusive possession of the collateral for
22 the secured -- putative secured party's interest to be deemed
23 enforceable and perfected.

24 The debtor through its principal Moty Spector
25 vehemently denies any intention to grant a security interest to

In re D&M Capital Group LLC - 12/12/19

60

1 Essex as to any of the precious stones. Even if the parties had
2 orally agreed on such an arrangement, the debtor points out that
3 the form memo used for the transactions by D&M includes a "no
4 oral modifications and merger clause" which provides that "the
5 seed of the merchandise constitutes your agreement to the
6 foregoing terms which represent the entire contract with respect
7 to the merchandise herein described and which cannot be varied
8 by oral statements, dealings with respect to other merchandise,
9 or any contrary customs of trade."

10 Moreover, the debtor also points out that form terms
11 of the memos from the debtor to Essex also show that D&M had no
12 intention to grant a security interest to Essex as the memos
13 state as follows: "The merchandise described above is delivered
14 to you on memorandum upon express condition that all such
15 merchandise shall remain the property of D&M Capital Group and
16 shall be returned on demand and in full in its original form. A
17 sale of all or any portion of the merchandise shall only occur
18 if and when we agree, and you shall have received a separate
19 invoice. Receipt of the merchandise constitutes your agreements
20 to the foregoing terms which represent the entire contract with
21 respect to the merchandise herein described and which cannot be
22 varied by oral statements, dealings with respect to other
23 merchandise, or any contrary customs of the trade."

24 The debtor asserts that because possession of the
25 previous stones was revocable, the parties could not have

In re D&M Capital Group LLC - 12/12/19

61

1 intended to create a security interest which would require Essex
2 to have continued possession in order to retain such interest.
3 Finally, even though certain of the memos introduced into
4 evidence contain the notion collateral for a loan or similar
5 language, the debtor argues that such language fails to render
6 the memos ambiguous, and the Court need not look beyond the
7 memos themselves to determine the parties' intent.

8 Essex has failed to provide sufficient evidence to
9 support its claims that the parties had agreed to an oral
10 security agreement as to any of the precious stones as it cannot
11 demonstrate D&M's intent thereto. Based on the testimony of Mr.
12 Spector and the full record of the evidentiary hearing, the
13 Court finds that the evidence fails to support a determination
14 that a security interest was granted to Essex by the debtor with
15 respect to any of the six precious stones.

16 Even assuming, however, arguendo that the parties had
17 entered into an oral security agreement sufficient to grant
18 Essex a valid security interest in the precious stones, the
19 debtor argues that as a legal matter, Essex failed to properly
20 foreclose on its purported security interest in the precious
21 stones and had no legally supportable right to seize the
22 precious stones as repayment for any loan. Specifically, the
23 debtor submits that Essex failed to comply with the requirements
24 of the Uniform Commercial Code for strict foreclosure, the
25 process by which a secured party retains collateral in

In re D&M Capital Group LLC - 12/12/19

62

1 satisfaction of the secured debt.

2 Essex responds that as an agreed payoff of the loan
3 from Essex to D&M, Essex had the right to retain the precious
4 stones which it had in holding as collateral and that it now
5 owns the stones outright. The Uniform Commercial Code provides
6 in pertinent part and subject to certain exceptions and
7 applicable here that a secured creditor may accept collateral in
8 full or partial satisfaction of the underlying debt only if
9 among other things the debtor consents. New York Uniform
10 Commercial Code Section 9-620(a).

11 A debtor consents to an acceptance of collateral in
12 full satisfaction of the debt it secures only if the debtor
13 agrees to the terms, agrees to the terms in a signed writing
14 after its default to the secured creditor, one, sends the debtor
15 -- or the secured creditor, one, sends the debtor after its
16 default a, quote/unquote, proposal to accept the collateral in
17 full satisfaction of the debt it secures, and two, does not
18 receive a notice of objection to the proposal authenticated by
19 the debtor within 20 days. UCC Section 9-620(c).

20 The proposal must be in writing, signed by the secured
21 creditor, and include the terms on which the secured party is
22 willing to accept the collateral in satisfaction of the debt it
23 secures. UCC Section 9-102.

24 The Uniform Commercial Code does not allow
25 constructive foreclosure. Purported or apparent acceptance of

In re D&M Capital Group LLC - 12/12/19

63

1 collateral is ineffective unless, one, the secured party
2 consents to the acceptance in a signed writing or sends a
3 proposal to the debtor and, two, the requirements of Section 9-
4 620(a) are met which include the debtor's consent. See Uniform
5 Commercial Code Section 9-620(b).

6 Essex has failed to introduce any evidence that the
7 debtor consented to a strict foreclosure in the manner required
8 by Section 9-620 of the Uniform Commercial Code. There was no
9 written document evidencing Mr. Spector's agreement that Essex
10 retained any of the precious stones as repayment for a loan.
11 Further, when asked during his direct testimony whether he sent
12 the debtor any written proposal stating that Essex intended to
13 keep the precious stones, Mr. Alex Paul confirmed he did not.
14 When Mr. Spector was asked during his direct testimony whether
15 he gave Essex permission to keep any of the precious stones, Mr.
16 Spector testified that he did not.

17 Mr. Paul's failure to send the debtor a written
18 proposal regarding his intended foreclosure and the absence of
19 the debtor's confirmed consent to any such foreclosure causes
20 Essex's claim that it owns the precious stones as a result of an
21 agreed foreclosure to fail as a matter of law. A party holding
22 another party's collateral even if such collateral is held
23 pursuant to a valid security agreement cannot simply seize the
24 collateral to pay off an alleged debt without complying with all
25 provisions of applicable law.

In re D&M Capital Group LLC - 12/12/19

64

1 As previously stated, to obtain a preliminary
2 injunction, a movant must show, A, irreparable harm and, B,
3 either, one, a likelihood of success on the merits or, two,
4 sufficiently serious questions going to the merits to make them
5 a fair ground for litigation and a balance of hardships
6 decidedly tipping toward the party requesting the preliminary
7 relief. See Citigroup Global Markets, Inc. v. BCG Special
8 Opportunities Master Fund Limited, 598 F.3rd 30-35 (2d Cir.
9 2010).

10 The debtor has demonstrated that it is likely to
11 succeed on the merits of the adversary proceeding or at the very
12 least that sufficiently serious questions going to the merits
13 are present to make them a fair ground for litigation. The
14 issues raised by the debtor's application for a preliminary
15 injunction are intertwined with accounts of the amended
16 complaint which, among other things, seek turnover pursuant to
17 Section 542 of the Bankruptcy Code.

18 The Court's determination that the debtor has put
19 forth a prima facie case regarding its ownership of five of the
20 six precious stones and of its interest as a consignee in the
21 sixth stone, the ruby ring, supports a finding that this prong
22 of the preliminary injunction test has been more than satisfied,
23 Maintaining the status quo through a preliminary injunction will
24 enable the parties to fully adjudicate the issues in the
25 adversary proceeding and will prevent irreparable harm to the

In re D&M Capital Group LLC - 12/12/19

65

1 debtor, which factor the Court will discuss next.

2 Irreparable harm. The debtor argues that unless the
3 Court grants D&M's application for a preliminary injunction, the
4 debtor and its estate will be irreparably harmed. Specifically,
5 the debtor maintains that the taking of the precious stones
6 caused the debtor to file its Chapter 11 case and any failure to
7 preserve the debtor's alleged rights to recover such stones
8 through the adversary proceeding would cause irreparable harm to
9 the estate and may push the debtor into Chapter 7 liquidation.

10 According to the debtor that the debtor ultimately
11 prevails in this litigation, there is little certainty that the
12 debtors (sic) will cooperate and return the precious stones to
13 the debtor. In contract, Essex argues that there is no imminent
14 irreparable harm to the estate in the absence of a preliminary
15 injunction, even if the precious stones are sold by a third
16 party at the present time or during the pendency of the
17 adversary proceeding because the stones' value could be paid
18 through a, quote, simple monetary judgment in the event that the
19 debtor is ultimately successful on its claims against Essex.

20 The Court finds that the debtor has successfully
21 demonstrated that it would be irreparably harmed in the absence
22 of a preliminary injunction prohibiting the sale, transfer, or
23 disposal of the six precious stones at this time and that,
24 accordingly, a status quo should be maintained. There is no
25 record evidence for Essex's assertion that a money judgment here

In re D&M Capital Group LLC - 12/12/19

66

1 would be an equivalent substitute for a return of the precious
2 stones themselves should the debtor prevail in the adversary
3 proceeding. First, Essex has not demonstrated that it would
4 have sufficient funds to satisfy any money judgment and, second,
5 as the debtor speculates, it is possible that the defendants may
6 in fact be judgment-proof.

7 Further, given the uncertainty with respect to
8 the current location, insured status, and its potential
9 disposition of certain of the precious stones, the Court finds
10 that the debtor would be irreparably harmed if a preliminary
11 injunction was not granted.

12 Conclusion. The reasons set forth herein, the Court
13 finds that the debtor, one, has met its burden of proof to
14 demonstrate ownership in the precious stones, and, two, has
15 demonstrated a likelihood of success on the merits of the
16 adversary proceeding and irreparable harm if the preliminary
17 injunction is not granted. Accordingly, the debtor's
18 application for a preliminary injunction is granted as to the
19 six precious stones.

20 The Court orders the immediate return of Item 2950, a
21 pink diamond ring; two, Item JR0280, a yellow diamond ring;
22 three, Item JR036, a ruby ring; and four, Item JR0182, the
23 Kashmir sapphire ring to the United States and shall require
24 that such stones be properly insured by Essex during transit and
25 that proof of insurance be provided to the debtor. It is the

In re D&M Capital Group LLC - 12/12/19

67

Court's understanding that Item Numbers JE0104 and JP105 are currently being held in a vault at Chase Bank under the control of Mr. Israel, counsel to Essex.

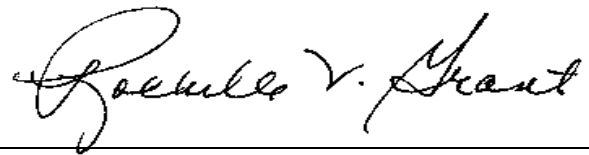
The Court orders that all six of the previous stones, including the two current stones currently held at Chase Bank and the four stones that are to be returned to the United States, shall be transferred to the custody, control of counsel to the debtor. Counsel to the debtor is directed to hold such stones in a secure vault until further order of this Court. The parties are directed to submit an order consistent with this bench decision.

Okay. That concludes the ruling.

CERTIFICATION

I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: December 17, 2019

A handwritten signature in cursive script, reading "Rochelle V. Grant". The signature is written in black ink and is positioned above a horizontal line.

Signature of Approved Transcriber